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1 P R O C E E D I N G S

2 (10:21 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument  
4 first this morning in Case 10-1016, Coleman v. The Court  
5 of Appeals of Maryland.

6 Mr. Foreman.

7 ORAL ARGUMENT OF MICHAEL L. FOREMAN

8 ON BEHALF OF THE PETITIONER

9 MR. FOREMAN: Thank you, Mr. Chief Justice,  
10 and may it please the Court:

11 The propriety of any section 5 legislation  
12 is judged by in reference to the historical perspective  
13 that it reflects, and that historical perspective is  
14 very clear in -- and it's set very clearly by Congress  
15 and by this Court. It -- it is an unfortunate, long  
16 history of State-Sponsored gender discrimination. And  
17 that discrimination embodies gender-based stereotypes  
18 that took a very firm hold in the employment area, where  
19 women had difficulty obtaining employment and holding  
20 employment. And this Court in a litany of cases  
21 recognized these gender-based stereotypes as an improper  
22 assumption about women's abilities.

23 In *Frontiero v. Richardson*, it rejected this  
24 issue that women's mission were to be women -- to be  
25 wives and mothers; *Stanton v. Stanton*, that women were

1 to be the homemaker and men the breadwinner, and --

2 JUSTICE KAGAN: Well, Mr. Foreman, I -- I  
3 guess the question in this case is what this particular  
4 statutory provision has to do with gender discrimination  
5 and the history of gender discrimination: Whether  
6 Congress was aiming to eradicate gender discrimination  
7 through this provision, or whether it was trying to do  
8 something else entirely.

9 MR. FOREMAN: And -- and it was directly  
10 attempting to address these gender-based stereotypes in  
11 a couple different ways as a practical matter. At that  
12 time, when an employer saw a woman, they didn't  
13 necessarily just see a worker. They saw a person that  
14 could become pregnant, and worked on these gender-based  
15 stereotypes, that that woman would either become  
16 pregnant, would be disabled because of pregnancy-related  
17 disabilities, but in any event was a least -- least  
18 attractive employee.

19 And the Family and Medical Leave Act  
20 addresses that specifically in its purposes section. It  
21 specifically says that it is intended "to promote the  
22 equal opportunity for women and men pursuant to the  
23 Equal Protection Clause."

24 But more specific to the self-care  
25 provision, Congress made it very clear what they were

1     trying -- attempting to do.

2                   If you move to the "findings" section,  
3     first, in finding number 6, they address --

4                   CHIEF JUSTICE ROBERTS:   Where -- where are  
5     you reading from, counsel?

6                   MR. FOREMAN:   I am reading from appendix A  
7     to the brief, and it is -- that "employment standards  
8     that apply to one gender only have a serious potential  
9     for encouraging employers to discriminate against  
10    employees and applicants of employment who are of that  
11    gender."   That's the negative inference argument that we  
12    make in our brief.

13                   But even more to the point, if you move to  
14    the purpose sections at appendix 2, page -- appendix 2,  
15    it specifically is intended to minimize the potential  
16    for employment discrimination on the basis of sex by  
17    ensuring generally that leave is available for eligible  
18    medical reasons, including maternity-related  
19    disabilities, and for compelling family reasons, and  
20    ensure equal protection under the law --

21                   JUSTICE ALITO:   Well, following up on  
22    Justice Kagan's question, I have -- I have difficulty  
23    seeing how providing 12 weeks of leave for self-care for  
24    both men and women affects the incentive of an employer  
25    who we will assume has an inclination to discriminate

1 against women based on the possibility that a -- a woman  
2 applicant for employment may become pregnant. I -- I  
3 just don't see how that would affect the incentives  
4 of -- of an employer in that situation.

5 MR. FOREMAN: The rationale of Congress at  
6 that point was that they could address this issue  
7 several different ways; they -- and they passed (A),  
8 (B), and (C): The birth of the child, the adoption of  
9 the child, and the Family and Medical Leave Act,  
10 against -- again, addressing gender-based stereotypes.

11 JUSTICE ALITO: Well, (A) is not at issue,  
12 right? Okay.

13 So we're just dealing with (D), which  
14 concerns a serious health condition. So you have an  
15 employer who is willing to discriminate on the basis of  
16 gender, and the employer has two applicants for  
17 employment, a man and a woman. And the employer says,  
18 well, if I hire the man, he might take 12 weeks of leave  
19 for a serious medical condition. And if I hire the  
20 woman, she might take 12 weeks of leave for a serious  
21 medical condition which might be something that either  
22 men or women could get, or it also could be a sickness  
23 related to pregnancy.

24 So, there still is -- there still would be  
25 an incentive for this hypothetical employer to

1 discriminate against the woman.

2 MR. FOREMAN: But one of the things Congress  
3 tried to do is to take that incentive away.

4 JUSTICE ALITO: But how does it do that?  
5 That's what I'm -- I understand that and it's a worthy  
6 objective. I just don't understand how giving both men  
7 and women 12 weeks for self-care affects the incentive.

8 MR. FOREMAN: It affects the incentive by  
9 providing -- it becomes the equal opportunity employer.  
10 It evens the ground. And the way it would do it is an  
11 employer if you just have (A) through (C) can look at an  
12 employee and, based upon gender stereotypes, would make  
13 the assumption that the women, because of historically  
14 the role they were required to play, would be taking all  
15 the leave under (A) and (B) and (C). And so why would I  
16 even hire that woman in the first place?

17 JUSTICE KAGAN: But women don't get sick  
18 less often than men, do they?

19 MR. FOREMAN: No, absolutely.

20 JUSTICE KAGAN: So you're just adding  
21 something to both sides of the balance and it doesn't  
22 affect the employer's incentive. The employer still --  
23 the hypothetical discriminatory employer would still  
24 say, well, women are going to be caregivers more often,  
25 so I'm -- I'm going to not hire that person.

1                   MR. FOREMAN: But under (A), (B), and (C)  
2 after the Family and Medical Leave, an employer would  
3 look and say both men can take leave now. And I think  
4 we need to step back --

5                   JUSTICE KAGAN: And that's why (A), (B), and  
6 (C) go to the problem, but what does (D) have to do with  
7 it? If you assume that both men and women get sick at  
8 an approximately equal rate -- maybe you don't assume  
9 that -- but if you do, it doesn't seem to factor into  
10 the employer's incentives in any way.

11                  MR. FOREMAN: There's nothing in the record  
12 that demonstrates that there's a differential rate  
13 between the self-care rate for men and women. But the  
14 perception was that women, because of pregnancy, because  
15 of pregnancy-related disabilities, would in fact take  
16 more leave. And so that I would look at a woman as an  
17 employer and say: She will become pregnant, she will  
18 take leave, she will be disabled. However, with (D)  
19 now, but the man can take a disability leave on the same  
20 basis.

21                  And the hope of Congress was not that it  
22 would happen immediately, but by the -- what would  
23 happen is with the application of family and medical  
24 leave at some point men would be taking (A), (B), and  
25 (C), and in fact, women and men would be taking family



1 and medical self-care leave --

2 JUSTICE GINSBURG: Mr. Foreman, I think  
3 everyone has been trying to get you to focus on the  
4 health care sickness leave alone, and in the -- in the  
5 portions of the act that this Court upheld, the Congress  
6 said there is this close association of women with  
7 children; we think it's going to be good for everybody  
8 if fathers recognize their responsibility for elderly  
9 parents, sick children, sick spouse. So, we -- we can  
10 see the rationale for trying to change the stereotype,  
11 trying to open up care-giving for both sexes.

12 But you have answered the question that  
13 women and men get sick; there's no -- there's no  
14 disproportion. So how do you tie that, just that part  
15 of the act, where there isn't the obvious association of  
16 women with childbearing? So we extend the benefit to  
17 men, so they will be associated with child care. There  
18 isn't that same link here, is there?

19 MR. FOREMAN: I think it is the same linkage  
20 trying to address -- it's addressing a difference there,  
21 but it's addressing the linkage that women will in fact  
22 take pregnancy-based leave or pregnancy-based  
23 disabilities and therefore are less attractive, less --  
24 employed; and that is what self-care was intended to do.

25 JUSTICE KAGAN: So you are saying -- let me

1 just make sure I understand. You are saying that the --  
2 that Congress is thinking that an employer actually does  
3 think that women take more sick leave because women get  
4 pregnant. And just as Congress was thinking about the  
5 employer who thought women are going to take more family  
6 leave, you think Congress was thinking about the  
7 employer who thinks women are also going to take more  
8 sick leave because of pregnancy?

9 MR. FOREMAN: Absolutely, Your Honor. And  
10 in response to Justice Alito's question -- and I'm sorry  
11 if I gave a confusing response. There are two separate  
12 ways of addressing that.

13 You can look at self-care as a stand-alone  
14 provision, without (A), (B), and (C), Congress passed  
15 just self-care. In that case it would be responding to  
16 exactly that type of gender stereotype, and 12 weeks  
17 would be a congruent proportional response.

18 The other way to look at it is that's not  
19 the way Congress passed the bill. They passed it as a  
20 comprehensive response with (A), (B) and (C), and hence  
21 (D) then becomes a bit of an equalizer to take away this  
22 negative incentive that only women would take (A), (B),  
23 and (C). So there's two separate ways that this Court  
24 can get to the same conclusion, and that conclusion is  
25 that this is a congruent and proportional response to

1 gender-based discrimination.

2 JUSTICE KAGAN: Do you have any evidence  
3 that Congress in fact was thinking about either of these  
4 two things? Is there anything in the record that  
5 suggests either of those two theories?

6 MR. FOREMAN: Yes, there -- there is, Your  
7 Honor. And let me -- let me take the negative inference  
8 first, because I think looking at the statute as a  
9 comprehensive makes sense -- is it was introduced -- and  
10 I am reading from page 43. It's referenced on page 43  
11 of our brief that, starting in 1987, National Women's  
12 Political Caucus testified, quote: "My primary purpose  
13 is to stress that parental and medical leave are  
14 inseparable. In the words of the old song, 'You can't  
15 have one without the other.'"

16 And the point she then later on to explain  
17 was parental leave without medical leave would encourage  
18 discrimination against women of child-bearing age, who  
19 constitute approximately 73 percent of all women in the  
20 workforce. Employers would tend to hire men, who are  
21 much less likely to make this claim.

22 Fast forward to 1993 at the time of the  
23 passage of -- and this would be on page 42 of our merits  
24 brief: "A law providing special protection to women or  
25 any defined group, in addition to being inequitable,

1 runs the risk of causing discrimination." The FML  
2 addresses this by addressing the needs of all workers,  
3 avoids this risk. The FMLA is based on the guarantees  
4 of equal protection. So it addresses that aspect of --  
5 it addresses that aspect.

6 JUSTICE SOTOMAYOR: Counselor, I -- I take  
7 your argument, but if you look at the legislative  
8 record, the reports, the findings, et cetera, and the  
9 statements repeatedly by many congresspeople, there  
10 appears to be -- have been a dual motive for this  
11 provision. They were in fact engaged in the question of  
12 discrimination against pregnant women. That was  
13 recognized in Hibbs, and that's clear.

14 But with respect to this particular  
15 provision, they were also concerned about economic  
16 effect that -- that happened to everyone, men and women,  
17 who became disabled. And so they appear to have had  
18 dual motivation. Part of the bill was gender-related,  
19 part of the bill seemed to be disability-related.

20 What do -- how do we judge that kind of  
21 bill, where Congress may have been expanding the  
22 benefits it's giving to people, not solely because of  
23 gender discrimination, but because of this desire to  
24 address disability discrimination?

25 MR. FOREMAN: Justice Sotomayor, I -- I

1 think the way you judge it is rely on what Congress's  
2 expressed findings and provisions are. And to the  
3 extent this Court makes a determination that the FMLA is  
4 responsive to gender-based discrimination, then how  
5 Congress chose to address that is congruent and  
6 proportional.

7           The fact that Congress may also have had  
8 other motives, that there was a concern with -- with  
9 families, and that families would benefit, should not be  
10 used to undermine the fact that Congress indeed was  
11 acting pursuant to one of its broadest powers, section 5  
12 of the Fourteenth Amendment, and therefore that their --  
13 their considered judgment is a congruent and  
14 proportional response.

15           Part of -- part of the findings is clearly  
16 reflective of the fact that this covered both  
17 governmental employers and private industry, so there  
18 was reference to Commerce Clause type of -- of analysis  
19 which my colleagues raised repeatedly in their brief.  
20 But the court -- the Congress needed to do that because  
21 they were regulating private employment, but at the same  
22 time recognized the extent that we are --are going to  
23 regulate State-based conduct.

24           JUSTICE ALITO: Well, with respect to the  
25 Commerce Clause, could I ask you this. If we were to

1 disagree with you on the Fourteenth Amendment and hold  
2 that it -- that Congress didn't validly abrogate State  
3 sovereign immunity with respect to subsection (D), would  
4 your client still be able to seek reinstatement or other  
5 injunctive relief?

6 MR. FOREMAN: Justice Alito, I think what  
7 you're -- you'll clearly correct me if I am wrong, but I  
8 think what you are responding to, is there an Ex parte  
9 Young action here that would be able to be made  
10 consistent with the Commerce Clause, under the Commerce  
11 Clause?

12 And the answer is -- and I know that both  
13 Justice Kennedy and Justice Rehnquist, I think, in one  
14 of his dissents, pointed out in the Family and Medical  
15 Leave Act that the employee may not be left out in the  
16 dark, because there is an Ex parte Young claim.

17 A couple points on that --

18 JUSTICE ALITO: Here the district court  
19 completely dismissed your FMLA claim, not just insofar  
20 as you sought damages. I -- I think you also sought  
21 reinstatement and other equitable relief, but the  
22 district court dismissed it completely.

23 MR. FOREMAN: That's right.

24 JUSTICE ALITO: But you are not contesting  
25 that, are you?

1                   MR. FOREMAN: We are not contesting it  
2 consistent with any Ex parte Young claim. What the  
3 district court did was, the claim is totally dismissed  
4 based on Eleventh Amendment immunity.

5                   But if I could try to respond to your  
6 question more specifically, this Court has never as a  
7 Court hold that Ex parte Young type of action is  
8 available in this type of claim. Assuming that it --

9                   JUSTICE KENNEDY: Because this is for money  
10 damages.

11                  MR. FOREMAN: Pardon?

12                  JUSTICE KENNEDY: Because this is for money  
13 damages. Ex parte Young was just injunctive relief.  
14 The Eleventh Amendment primarily protects the treasury  
15 of the State against money damages.

16                  MR. FOREMAN: Correct.

17                  JUSTICE KENNEDY: And it's not Ex parte  
18 Young.

19                  MR. FOREMAN: Correct. But as -- as you  
20 pointed out in your dissent in Hibbs, that Ex parte  
21 Young may be available, but one of the concerns we have  
22 is again that the Court -- the majority Court has never  
23 held that. I believe that is in fact the correct  
24 interpretation of the law, that it would be available  
25 for injunctive relief. However, the Court has never

1 defined the parameters of what an Ex parte Young action  
2 really gives a plaintiff, and that becomes very  
3 important --

4 JUSTICE ALITO: You said in this case.  
5 That's basically what I'm asking. If we were to  
6 disagree with you on the Fourteenth Amendment, are you  
7 asking us -- would we then simply affirm the Fourth  
8 Circuit? Or would we have to -- would we have to make  
9 some accommodation for the possibility that the  
10 dismissal of your claim insofar as you sought injunctive  
11 relief may have been improper?

12 MR. FOREMAN: I think you would have to make  
13 that accommodation, but, with respect, Your Honor, I  
14 think that would be an incorrect approach. And here's  
15 the reason why in Ex parte Young, a perfect example --

16 JUSTICE ALITO: I am trying to be a little  
17 bit helpful to you.

18 MR. FOREMAN: And apparently I missed that  
19 and I apologize.

20 JUSTICE ALITO: Okay.

21 JUSTICE GINSBURG: What relief did you ask  
22 for? Damages we know and you have to overcome the  
23 Eleventh Amendment. Injunctive relief you don't, but  
24 did you ask for it?

25 MR. FOREMAN: In the complaint itself, it



1 does not ask for injunctive relief pursuant to the  
2 Family and Medical Leave Act. There were combined  
3 claims --

4 JUSTICE ALITO: I thought you did, but maybe  
5 I'm reading your complaint more generously than you read  
6 it yourself.

7 JUSTICE KAGAN: I would go with  
8 Justice Alito here.

9 MR. FOREMAN: If that is your reading of it,  
10 we will certainly accept your reading.

11 JUSTICE GINSBURG: You must have asked for  
12 such other and further relief.

13 MR. FOREMAN: But again back to the Ex parte  
14 Young, in the case Nelson v. The University of  
15 Tennessee -- Texas, the case that dealt exactly with  
16 this issue of abrogation of Eleventh Amendment immunity,  
17 and they found that there was valid abrogation of the  
18 Eleventh Amendment immunity, the State of Texas -- then  
19 the court was required to address the Ex parte Young  
20 issue. And the State of Texas argued that reinstatement  
21 is not an appropriate remedy under Ex parte Young and  
22 that, while the Fifth Circuit ultimately rejected that,  
23 that is an argument that employees would have to face,  
24 what are the parameters of Ex parte Young. And more  
25 importantly, that is not the remedy that Congress in

1 their considered judgment believed was the appropriate  
2 remedy to address gender-based discrimination.

3 JUSTICE GINSBURG: Well, Congress must have  
4 thought that giving the woman back her job was an  
5 important part. The whole idea is she wasn't supposed  
6 to be fired. So I think that the -- the relief, the  
7 non-monetary relief, is certainly important.

8 MR. FOREMAN: It is extremely important, but  
9 Congress did not stop there. Congress decided it needed  
10 to take one step further and there needed to be monetary  
11 relief. And I think Mr. Coleman's case illustrates  
12 exactly why. Here Mr. Coleman exercised his rights that  
13 were supposedly guaranteeing him under the Family and  
14 Medical Leave Act, and indeed under a State law, and the  
15 State of Maryland fired him and he is out of work. And  
16 what is the disincentive for the State to not do the  
17 same thing the next time if the only thing that you can  
18 get is possibly injunctive relief prohibiting him from  
19 doing that in the future and maybe reinstatement 2 or 3  
20 years down the line? Employees at that point cannot put  
21 their lives on hold. They have a duty to go out and try  
22 to mitigate, try to find another job.

23 What is an employer to do? And Congress  
24 said there needs to be more. We passed Title VII to try  
25 to address gender-based discrimination, the Pregnancy

1 Discrimination Act, but there were still voids. And the  
2 Family and Medical Leave Act attempts to fill those  
3 voids and one of those voids is try to provide a  
4 monetary incentive so that the State of Maryland and  
5 private employers will in fact comply with the law.

6 JUSTICE GINSBURG: When you --

7 JUSTICE SOTOMAYOR: Can I -- I'm sorry.

8 JUSTICE GINSBURG: When you say you're  
9 concerned about a disincentive to hire women, but the  
10 Pregnancy Discrimination Act makes that unlawful, so if  
11 an employer decides I don't want to hire women of  
12 child-bearing age, that is an out-and-out violation of  
13 the Pregnancy Discrimination Act, isn't it?

14 MR. FOREMAN: That is, Your Honor, but the  
15 Pregnancy Discrimination Act did not fill the other gap  
16 which the Family and Medical --

17 JUSTICE GINSBURG: But you are relying on  
18 the incentive, the disincentive to hire women of  
19 child-bearing age. The law protects the woman of child-  
20 bearing age by saying: Employer, you can't refuse to  
21 hire her, promote her, and all the rest because of  
22 pregnancy.

23 MR. FOREMAN: What the Pregnancy  
24 Discrimination Act provided was that you needed to treat  
25 pregnancy-related disabilities as you would other

1 short-term disabilities. So if an employer decided not  
2 to provide --

3 JUSTICE GINSBURG: I'm just asking you  
4 about -- your -- your argument rests on an employer  
5 acting unlawfully, you see. He won't hire -- we have to  
6 give them medical leave to everyone because otherwise  
7 the employer won't hire women. And that's -- the  
8 question I'm asking is, you are assuming that the  
9 employer will break the law by refusing to hire women  
10 that -- of child-bearing age.

11 MR. FOREMAN: I don't want to make that  
12 assumption in my incentive argument. I was using Mr.  
13 Coleman as an example of why Congress could have made a  
14 determination that monetary relief would be appropriate  
15 in the Family and Medical Leave Act.

16 JUSTICE GINSBURG: But your argument to a  
17 large extent depends -- or you say Congress did this  
18 because they wanted to eliminate or at least reduce one  
19 kind of discrimination against women in the job market.

20 MR. FOREMAN: Yes.

21 JUSTICE GINSBURG: And that -- that  
22 discrimination was refusing to hire women of child-  
23 bearing age. Well, they couldn't do it out and out  
24 because that would be a violation of the law. So is  
25 Congress having in mind discrimination that is under --

1 under the radar screen, that is going to go on even  
2 though it's unlawful?

3 MR. FOREMAN: I -- I don't think that was  
4 Congress's intent. That is not what was reflected. I  
5 think, again, they were trying to address it on two  
6 separate levels: One, the gender-based discrimination,  
7 the gender stereotype that women simply become less  
8 attractive; and in the broader statute to prevent the  
9 negative inference so that all -- that ultimately where  
10 we would get in society is the ability to take  
11 pregnancy-related leave, other leave, would not be  
12 viewed as a negative inference running against women,  
13 and therefore women ultimately would become a nonissue.

14 And I see the light's on, so if I could  
15 reserve the balance of my time.

16 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
17 Mr. Howard.

18 ORAL ARGUMENT OF JOHN B. HOWARD, JR.,  
19 ON BEHALF OF THE RESPONDENTS

20 MR. HOWARD: Thank you, Mr. Chief Justice,  
21 and may it please the Court:

22 In order to affirm in this case, the Court  
23 need go no further than to distinguish Hibbs, and we  
24 think Hibbs is readily distinguishable. And I would  
25 like to highlight four principal --

1 JUSTICE GINSBURG: Need go no further? I'm  
2 sorry?

3 MR. HOWARD: I'm sorry, Justice Ginsburg.  
4 Need go no further than simply to distinguish Hibbs.  
5 And we think there are at least four distinctions that  
6 we'd like -- I'd like to highlight today. The first is  
7 one that, Justice Kagan, your question goes to, which is  
8 subsections (A), (B), and (C) are all related in some  
9 fashion to women's roles with respect to work and  
10 family. Subsection (D) really does not speak to that  
11 purpose.

12 And I think my second sort of distinction I  
13 would point to --

14 JUSTICE KAGAN: If I could just stop you  
15 there, Mr. Howard, for a second. I took from Mr.  
16 Foreman something that I hadn't understood from his  
17 briefs -- maybe because I just missed it -- which is  
18 that he's making a kind of analogous argument, that,  
19 just as in the prior provisions of the act, employers  
20 thought of women as caregivers and the response of  
21 Congress was to provide a gender-neutral leave benefit  
22 that had both -- that both women and men were eligible  
23 for.

24 So here, employers think of women as needing  
25 more medical leave because of pregnancy, and the

1 response of Congress is to provide gender-neutral sick  
2 leave. So what is your response to that argument?

3 MR. HOWARD: Congress, Justice Kagan, did  
4 not I think take that stereotype or perception that Mr.  
5 Foreman referred to into account. And I'd specifically  
6 point the Court to page 21 of our brief, where we cite  
7 some Bureau of Labor Statistics studies indicating that  
8 men and women at the time took roughly the same amount  
9 of sick leave. In fact, Mr. Foreman has conceded as  
10 much. And that same study projects that men and women  
11 will take roughly the same amount of time after the  
12 enactment of the FMLA --

13 JUSTICE SOTOMAYOR: But, there certainly  
14 was -- there was certainly much conversation and  
15 testimony that, whether they in fact took the same  
16 amount of leave time or not, that women who were  
17 pregnant or were perceived as capable of getting  
18 pregnant were hired less frequently because subjectively  
19 the employers thought that they were more likely to take  
20 the time.

21 So, frankly, for years there was questions  
22 about whether law firms were hiring young -- not hiring  
23 young women because they feared they would leave in the  
24 middle of a big case or something else. We all know  
25 those stories, so it is sort of common knowledge in many

1 ways, but there was plenty of testimony related to that.  
2 So assume that that was Congress's perception, because  
3 it was supported by the record or as much of the record  
4 as Hibbs recognized as adequate. Where does that leave  
5 your argument?

6 MR. HOWARD: Well, I would make a couple of  
7 points in response to that, Justice Sotomayor. First,  
8 the Pregnancy Discrimination Act was already in place,  
9 and so to the extent there were perceptions that  
10 employers might discriminate based on pregnancy  
11 disabilities, that would be unlawful under Title VII as  
12 amended by the Pregnancy Discrimination Act.

13 And the fact that -- and you are quite right  
14 that there is a fair amount of discussion in the  
15 legislative record, although I think it's less of a  
16 predominant theme than the concern for job security for  
17 working families, but there certainly is discussion  
18 about pregnancy discrimination and pregnancy disability  
19 as a type of illness. But, we again would note that  
20 this is valid Commerce Clause legislation, and so to the  
21 extent that kind of discrimination was occurring, and  
22 leave was being denied or women were suffering adverse  
23 consequences in the workplace as a result of pregnancy  
24 discrimination, they could enforce the 12 weeks through  
25 a Title VII action.



1 JUSTICE GINSBURG: They couldn't -- the  
2 Pregnancy Discrimination Act says you have to treat  
3 pregnancy like any other disability. So if they are not  
4 giving anybody any leave for anything, they don't have  
5 to give any leave; not 12 weeks, not 1 day. And that's  
6 what -- that's the gap that this legislation fills,  
7 essentially. Yes, you do have to provide leave for  
8 women who have disabling conditions, including  
9 pregnancy, but then you have to give that to the men as  
10 well. You can't reserve that for the one sex. So it  
11 was the gap in the Pregnancy Discrimination Act that  
12 this -- this was referring to.

13 MR. HOWARD: Yes, I agree, Justice Ginsburg.  
14 But the gap that existed was the absence of a guaranteed  
15 period of leave. In other words, it was the absence of  
16 the substantive entitlement to a certain amount of  
17 leave. And in effect the gap that was being filled  
18 served as prophylaxis for Title VII, but not for  
19 constitutional violations. Now --

20 JUSTICE ALITO: Assume for the sake of  
21 argument that for the applicants for particular  
22 provisions -- particular positions, I should say --  
23 where the applicants are typically of a certain age, men  
24 tend to take less sick leave than women, because women  
25 also take sick leave for pregnancy-related illnesses.

1 So giving everybody 12 weeks eliminates the possibility  
2 that women who will be taking -- want to take  
3 additional -- want to take more sick leave will be fired  
4 because they exceed the amount of sick leave allowed by  
5 the employer for everybody. Now, isn't that connected  
6 to eliminating discrimination in employment?

7 MR. HOWARD: Justice Alito, I think that one  
8 could argue that that is connected with eliminating  
9 pregnancy disability discrimination. It's also  
10 connected to the purposes of (A), (B), and (C). I think  
11 that the principal reason why employers do view  
12 potential hires as -- when they are women, as likely to  
13 take a lot of time off, I think goes more to the family  
14 caretaking provisions, and I think that is largely  
15 reflected in the record.

16 JUSTICE ALITO: Well, I don't think -- I  
17 have difficulty with the incentives argument either,  
18 honestly, either as the (D) or as to (C). But I'm just  
19 talking about an argument based on consequences. If an  
20 employer says you get 2 weeks of sick leave, period,  
21 after that if you can't come back you are fired, that  
22 may, at least for applicants within a certain age range,  
23 that may have a much more severe or a more severe impact  
24 on women than on men.

25 MR. HOWARD: Yes, Justice Alito, and I

1 think what --

2 JUSTICE ALITO: What would the answer to  
3 that be, that that's not intentional discrimination?

4 MR. HOWARD: That would certainly be part of  
5 the answer, and what I was going to say was that what  
6 you are describing is a disproportionate impact on women  
7 as a result of assumptions concerning pregnancy  
8 disability. And of course, if States were engaging in  
9 this kind of conduct or if there were a disproportionate  
10 impact, that would not state an equal protection  
11 violation under Washington --

12 JUSTICE BREYER: Why are you separating the  
13 four things. I mean, I have heard it seems to me three  
14 separate rationales. One, the easiest, is in (D)  
15 itself, sometimes a woman could have a miscarriage and  
16 of course she has to stay home. And that isn't covered  
17 by (A), (B), or (C), so we cover it in (D), you know.  
18 And then we put the men in too because we don't want to  
19 make this incentive just to not hire women. That's one.

20 The second one was the one Justice Ginsburg  
21 brought up, that there is a gap in the pregnancy law  
22 which won't work unless you have to give people some  
23 medical leave. So here it is, (D).

24 And the third one, which I think was related  
25 to what Justice Alito just said, is when -- you have to

1 read it together to understand the third one. You get  
2 12 weeks altogether, all right? Now, that means once  
3 you put in (D) this act will have less of a bad effect.  
4 The bad effect of the act is if you protect the women  
5 then the employers say, well, we're not going to hire  
6 women, perfect. We have to give them 12 leaves, we'd  
7 have to give the men -- terrible, it's a terrible  
8 disincentive.

9 But then they worked out how to lessen the  
10 disincentive. And the way you do that, you say 12 weeks  
11 overall. Now look what happens. A woman wants to take,  
12 say, 12 weeks to look after her family, and she gets  
13 separately sick, 4 more weeks. But how many does she  
14 get? Answer: 12, right? 12. You could answer, 12.

15 Now let's think of the man. Let's think of  
16 the man. The man would like to look after the family,  
17 say, for 6 weeks. And he gets sick 4 weeks. How many  
18 weeks have we got?

19 MR. HOWARD: 10.

20 JUSTICE BREYER: 10. Thank you.

21 (Laughter.)

22 JUSTICE BREYER: All right.

23 MR. HOWARD: I like these questions.

24 JUSTICE BREYER: Perfect.

25 So now the employer is sitting -- and it

1 will work with other numbers. I don't rely on those.

2 (Laughter.)

3 JUSTICE BREYER: But now look what happens.

4 Without this act, he's got a woman who is going to be

5 out of there -- I mean, with the act-- unless we put in

6 four -- unless we put in the fourth part of it, we have

7 a woman who is gone for 12 weeks, and a man who is gone

8 maybe for 6 but maybe for zero, okay? Maybe for 6.

9 With the act, the woman is gone for 12, the man is gone  
10 for 10. You see?

11 And so the comparison there -- and it will  
12 work with whatever numbers you want -- the comparison  
13 there is very different. And the comparison doesn't,  
14 doesn't totally erase the problem with the woman, but it  
15 may reduce it to a size where the Act itself will no  
16 longer act as such a disincentive to hiring a woman.

17 Now, we have three different rationales.  
18 All of them are related to a serious problem, which is  
19 the problem of discrimination against women because the  
20 employers think they will be home more, and so you see  
21 the conclusion I am drawing? Yeah, okay. So where are  
22 we?

23 MR. HOWARD: Well, let me speak first to the  
24 second one, the concern about the gap. The gap that is  
25 filled by the 12 weeks is, is a -- is to provide a

1 substantive entitlement. And when it permits a claim, a  
2 damages claim enforceable against the State treasury, it  
3 provides an entirely -- it requires a different  
4 justification than simply to fill a gap with the  
5 substantive entitlement. If the --

6 JUSTICE GINSBURG: The idea is it's part of  
7 one package. I think that's what Justice Breyer was  
8 getting at. But just suppose that Congress wanted to  
9 improve conditions for the -- in the job market for  
10 women, which I think it's fair to say was the motivating  
11 force behind this act, and they also wanted to protect  
12 families so that sick children, sick spouses are  
13 attended to.

14 Now, what leave policy would say, okay, to  
15 do that we will have leave when a spouse is sick, a  
16 child is sick, a parent is sick, but not when the worker  
17 herself is sick? Without -- it's all part of one  
18 package which is designed to increase job security for  
19 women and increase protection for their families. So, I  
20 don't think you can slice off (D) from the other three.

21 MR. HOWARD: Justice Ginsburg, I think you  
22 can separate (D), on the same analysis that this Court  
23 applied in Tennessee v. Lane, in contrast to the Garrett  
24 case. In Lane, of course, different sections of the  
25 same antidiscrimination act required different analysis,

1 analyses and reference to different parts of the record.  
2 There was a single over-arching purpose, to prevent  
3 discrimination against persons with disabilities, but  
4 the operation and effect of the particular claim  
5 requires a different analysis. As Justice Stevens said,  
6 the Court's not required to evaluate statutes as an  
7 undifferentiated whole.

8 JUSTICE BREYER: Well, it doesn't have to,  
9 of course. But the whole point of the question that I  
10 was asking was, sure, what helps you by doing it  
11 separately is it helps your case. But if we look at  
12 what Congress was trying to do, they were trying to do  
13 it as a whole. That's my point that I want you to  
14 answer. And they are trying to do it as a whole  
15 because, no matter what numbers I use, if I look at it  
16 without (D) -- is it (D)? Yeah, (D). If I look at it  
17 without (D), the ratio will disfavor the woman. And if  
18 I look at it with (D), suddenly the ratio from the point  
19 of view of the employer of the disadvantage of hiring a  
20 woman over -- over hiring a man, it goes way down. And  
21 that helps women.

22 And that is why I think, reading this and  
23 listening, a major reason why they put in (D) as part of  
24 the other, because working with that 12-week limitation,  
25 and the whole rest of the statute, we now have a statute

1 that doesn't defeat itself. We now have a statute that  
2 actually can achieve the end of leading employers to not  
3 discriminate against women. Not perfectly, but there's  
4 a big improvement. And that's the -- that's the  
5 argument I'm making. You have to read it as a whole to  
6 see that. And that's what I -- I wonder if there's an  
7 answer to that. Of course, I'm at the moment thinking  
8 there isn't an answer to it, but I ask the question  
9 because I want to hear what you say.

10 MR. HOWARD: Well, with respect to the  
11 ratio, I think the premise of that point is that women  
12 will take more leave for serious health conditions than  
13 men. And I don't think that's borne out. And, you  
14 know, Mr. Foreman has recognized as much. So I don't  
15 think the ratio really changes.

16 JUSTICE ALITO: Well, what if Congress had  
17 added three additional subsections here, and said that  
18 an employer has to provide 12 weeks of unpaid leave so  
19 that an employee can go to a health spa; 12 weeks of  
20 unpaid leave so that the employee can travel; 12 weeks  
21 of unpaid leave so that the employee can take an  
22 educational course.

23 Now, those could be taken advantage of by  
24 either men and women. It makes both men and women  
25 increasingly unattractive as employees and therefore



1 reduces any special disincentive that might have been  
2 created by (A), (B), and (C).

3 Now on that same logic, would those be --  
4 would those be provisions that further the elimination  
5 of discrimination based on gender?

6 MR. HOWARD: I think even if one accepted  
7 the premise, and we don't, that women take more leave  
8 for health conditions, that would further dilute the  
9 ratio, to have available all those types of leave. Now,  
10 I thought, for example, one could imagine --

11 JUSTICE SOTOMAYOR: I thought Justice Alito  
12 was trying to help you.

13 MR. HOWARD: He was.

14 JUSTICE BREYER: He's absolutely right. And  
15 that's why this health spa thing, (D), this is -- in  
16 fact has two independent reasons that all -- the  
17 miscarriage reason and the Pregnancy Act reason, and so  
18 it isn't just saying go to a health spa.

19 But I mean, I don't want to put arguments in  
20 your mouth, which I just have, which you wouldn't like  
21 there anyway, because -- but I would appreciate your  
22 going on with this discussion in respect to what  
23 Justice Alito and I have been talking about, and I would  
24 be interested in what you say.

25 JUSTICE SOTOMAYOR: I'm working from a

1 different proposition than you are in response to this  
2 question. I don't think that the actual amount of time  
3 that men and women take is relevant. The question is:  
4 What is the employer's perception, and did Congress have  
5 a valid basis, as Justice Kagan pointed out earlier, to  
6 believe that employers thought women took more time.

7 MR. HOWARD: I, I think that if -- even if  
8 that were correct, and, and I don't think it is, because  
9 I think the overwhelming themes in the legislative  
10 record as a whole really were a concern for working  
11 families, whether single-income, double-income, and the  
12 concern that if a breadwinner falls ill the family's  
13 going to have severe financial insecurity. And then  
14 there was also concern against discrimination against  
15 persons with illness.

16 But I think that one thing I would like to  
17 emphasize is that your suggestion, Justice Sotomayor,  
18 and really almost all of the discussion here today, I  
19 think explains why this is good social policy; we  
20 support it. But I don't think that we have really  
21 gotten anywhere near the necessary predicate of  
22 unconstitutional State conduct when the constitutional  
23 right is defined with some precision. And I think one  
24 has to define this right as, as disability. And I think  
25 also the protections that the Pregnancy Discrimination

1 Act already had in place, when added with the  
2 substantive -- to the substantive entitlement as a  
3 matter of Commerce Clause legislation, to this leave --

4 JUSTICE ALITO: Well, if the State of  
5 Maryland thinks this is good social policy, why is it  
6 asserting its sovereign immunity?

7 MR. HOWARD: Well, that's a good question,  
8 and I think we are here mainly on, we need to defend  
9 this on principle.

10 As, Justice Kennedy, you've pointed out in a  
11 number of your opinions, the exercise of the section 5  
12 power alters the Federal-State --

13 JUSTICE ALITO: You can waive. Can't you  
14 waive your Eleventh Amendment immunity?

15 MR. HOWARD: We could, I believe. That's --  
16 this Court --

17 CHIEF JUSTICE ROBERTS: Well, you can  
18 provide this, the kind of relief that's sought here  
19 without waiving your immunity, right? It's a matter of  
20 legislation.

21 MR. HOWARD: Yes, I think that's right, and  
22 there --

23 CHIEF JUSTICE ROBERTS: Can I just get back  
24 to the discussion before about how (D) relates to the  
25 others?

1 MR. HOWARD: Yes.

2 CHIEF JUSTICE ROBERTS: Who do you think  
3 benefits most from subsection (E), men or women? That's  
4 the one about armed services obligations at the time the  
5 law was passed?

6 MR. HOWARD: I assume, and I haven't studied  
7 the history of that, but I assume that, just based on  
8 the demographics of -- of the military, it's like --  
9 likely that there are more men in -- in service  
10 deployed, and that more women and wives benefit from  
11 that provision.

12 JUSTICE GINSBURG: Was that -- that wasn't  
13 part of the original act, was it?

14 MR. HOWARD: No, it was not.

15 JUSTICE GINSBURG: So it was -- that was --  
16 the concern was a discrete concern for veterans.

17 MR. HOWARD: Yes. And -- and we have not --

18 JUSTICE GINSBURG: It wasn't part of the  
19 package that was the Family and Medical Leave Act.

20 MR. HOWARD: No. And we are not suggesting  
21 that. We haven't raised that as a point in our briefs,  
22 or here today.

23 JUSTICE KAGAN: And -- and Mr. Howard, I --  
24 I do think that the point about the package is that if  
25 you look at (D) alone, you abstract it from everything

1 else, you have a good point, that it seems to be related  
2 to economic security, which is not a section 5 issue;  
3 that it seems to be related to discrimination against  
4 sick people, which would also put us in a different  
5 legal universe.

6 But when you look at (D) as passed at the  
7 same moment on the basis of the same record as (A,) (B,) and (C), with the overwhelming purpose of Congress being  
8 to protect women from discrimination in the workplace  
9 because of unfair stereotypical gender -- views about  
10 what women do as workers, then (D) assumes a different  
11 kind of aura.

12 And you can talk about a number of theories  
13 for that, but I guess I would just ask for your reaction  
14 to that, that (D) is just part of a package which was  
15 about telling employers, get rid of your old  
16 stereotypes, don't act on your old stereotypes, employ  
17 women.

18 MR. HOWARD: Well, I -- I would respond in  
19 part -- and I'm going to accept your proposition that I  
20 should discuss these provisions as part of a single  
21 package -- but from the standpoint of States, subsection  
22 (D) provides a separate claim, a separate basis to sue  
23 States, and we think that claim is incongruent and  
24 disproportionate to any conceivable unconstitutional  
25

1     conduct that it might prohibit. And I think this is  
2     borne out in the case law.

3                 We surveyed the 40 Federal cases that we  
4     could find under subsection (D). Only two involve  
5     pregnancy-related disabilities. Only one of them  
6     alludes in passing to headaches arising from pregnancy  
7     along with other stress-related conditions.

8                 But -- but all of the others really had to  
9     do with men and women benefiting from this leave for --  
10    to care for a serious health condition. So I would  
11    really emphasize, in response to your question, that one  
12    could look at it as a package, but from the standpoint  
13    of States it's a separate and independent claim and it's  
14    an extraordinarily broad one. And it is not necessary,  
15    not simply because Pregnancy Discrimination Act claims  
16    are available, but, Justice Alito, there are *Ex parte*  
17    Young claims available.

18                In -- in response to your question, in this  
19    case at the joint appendix pages 3 to 12, the amended  
20    complaint reveals that injunctive relief was sought,  
21    albeit -- and on page 12 is the prayer for relief --  
22    it's -- it's not clear whether that relief is sought  
23    under Title VII or FMLA or both. But the reason why I  
24    don't think the claim fails separate and apart from any  
25    sovereign immunity argument, of course, *Ex parte* Young

1 is not -- does not protect on that ground.

2 JUSTICE GINSBURG: There's some focus in the  
3 legislative history particularly on the -- the family  
4 that has a single parent -- much more often a woman, not  
5 a man -- and the devastating impact on that family of  
6 the woman getting sick, the sole breadwinner getting  
7 sick. So that was certainly a -- a problem for families  
8 with -- with only one breadwinner. And Congress was  
9 focusing on those women and wanting to have job security  
10 for them. That wasn't the only group of women, but  
11 certainly that -- that affected this act as it came out,  
12 didn't it?

13 MR. HOWARD: Yes. There is discussion in  
14 the record of the disproportionate impact that you say.  
15 But what -- what is left out -- well, it -- it is found  
16 in other parts of the record that -- the relevant --

17 JUSTICE SCALIA: The legislative record  
18 here?

19 MR. HOWARD: Yes. The -- I'm sorry, yes.  
20 The record of -- before Congress.

21 The relevant comparison, we think is not --

22 JUSTICE SCALIA: Is that a closed record?  
23 Is that a closed record, the way a record of a case is?

24 MR. HOWARD: I -- I am not sure I understand  
25 the question.

1 JUSTICE SCALIA: I just find it a strange  
2 expression to talk about "in the record," when what  
3 you're talking about is the legislative history.

4 MR. HOWARD: I misspoke. I do mean the  
5 legislative history.

6 The -- the relevant comparison we think is  
7 not between single parent families who were  
8 predominantly women, but between working families where  
9 it could be two parents with a single income, man or  
10 woman. It could be a family with two incomes but  
11 neither one can be lost. So -- and in any event, I  
12 think we're talking now about a disproportionate impact,  
13 which -- which would not state an Equal Protection  
14 violation.

15 JUSTICE GINSBURG: But the question of how  
16 Congress would do it if they -- if they provided only  
17 for the woman who was the single head of the family,  
18 then that would be vulnerable under Equal Protection  
19 because they didn't provide it for men.

20 MR. HOWARD: I think one would need to find,  
21 as this Court's cases have emphasized, a widespread  
22 pattern of unconstitutional conduct on -- in the part of  
23 States. And I think the circumstances, Justice  
24 Ginsburg, that you've described, do not flow from  
25 unconstitutional State action. They have their roots in



1 other socioeconomic causes, so --

2 JUSTICE GINSBURG: But (D) is a remedy for  
3 the problem. I think there's really not much  
4 disagreement about the problem, that there is gender  
5 discrimination in the job market.

6 MR. HOWARD: Yes.

7 JUSTICE GINSBURG: And then the question is  
8 how do we remedy that?

9 MR. HOWARD: Well, I -- I don't think by  
10 providing the very sweeping remedy of (D), which -- I  
11 see that my light's on. May I --

12 CHIEF JUSTICE ROBERTS: You can finish your  
13 sentence.

14 MR. HOWARD: We think that the remedy in (D)  
15 may cover the types of concerns you referred to, but  
16 I -- I would emphasize this is a disproportionate  
17 incongruent remedy. It subjects States to far more  
18 suits for unrelated health conditions than the Eleventh  
19 Amendment should permit.

20 Thank you, Mr. Chief Justice.

21 CHIEF JUSTICE ROBERTS: Thank you, counsel.

22 Mr. Foreman, you have 4 minutes remaining.

23 REBUTTAL ARGUMENT OF MICHAEL L. FOREMAN

24 ON BEHALF OF THE PETITIONER

25 MR. FOREMAN: This is not responsive to

1 disability-based discrimination. The findings and the  
2 purpose of the Family and Medical Leave Act make it  
3 clear that it is responsive to gender-based  
4 discrimination.

5           Hibbs in fact found that the FMLA was in  
6 response to gender-based discrimination. In making that  
7 finding, they did not differentiate between the  
8 different leave provisions. And indeed, if you move to  
9 Tennessee v. Lane, where Justice Rehnquist dissented,  
10 drawing distinctions between disability-based  
11 discrimination and sex-based discrimination, stated that  
12 the task of identifying the constitutional right at  
13 issue in the Family and Medical Leave Act was "an easy  
14 one." And that was his word, "easy."

15           It's responsive to gender-based  
16 discrimination.

17           Chief Justice Roberts, I think your question  
18 about the military leave portion of the FMLA illustrates  
19 that Congress -- what Congress was doing here when they  
20 added that almost 10 years later, they just -- did not  
21 simply try to pigeonhole it into -- this is section 5  
22 legislation. In the circuits at that time, there was  
23 considerable debate as to whether that could be  
24 justified as proper abrogation of immunity --

25           CHIEF JUSTICE ROBERTS: Do you think it

1 would be --

2 MR. FOREMAN: -- I'm sorry.

3 CHIEF JUSTICE ROBERTS: Do you think it  
4 would be -- how -- how would this case come out if we  
5 were dealing with -- with from subsection (E)? Do you  
6 think that should be treated separately than the prior  
7 ones?

8 MR. FOREMAN: Yes, it should, because it was  
9 passed pursuant to a different constitutional power, and  
10 they provided in fact a different remedy, recognizing  
11 that the Commerce Clause could not -- that Commerce  
12 Clause was the appropriate way to deal with this. And  
13 they provided a right of action by the United States in  
14 order to provide damages.

15 CHIEF JUSTICE ROBERTS: If -- if we think  
16 that you should look at these provisions separately,  
17 where with respect to (D) -- and I'm looking at one of  
18 our prior precedents -- has Congress unequivocally  
19 declared its intent to abrogate sovereign immunity?

20 MR. FOREMAN: As to --

21 CHIEF JUSTICE ROBERTS: -- unequivocally.  
22 Not on the basis of implications from -- from how the  
23 other provisions work. But if you do look at (D), is  
24 there anyplace where Congress unequivocally declared its  
25 intent to abrogate State sovereign immunity?

1                   MR. FOREMAN: Well, I -- I think it -- yes,  
2   Your Honor. It's in -- they provide that the State is  
3   an employer for purposes of coverage of the Family and  
4   Medical Leave Act. And if you go to 29 U.S.C. 2005,  
5   where it says a public entity is covered by the Family  
6   and Medical Leave Act, then -- that damages are  
7   available. It specifically includes State.

8                   In terms of my colleague's attempt to  
9   distance this case from Hibbs, in all due respect, we  
10   think that Hibbs did the heavy lifting here. It is the  
11   same legislative purpose. It is the same constitutional  
12   right. It is the same statutory scheme.

13                  CHIEF JUSTICE ROBERTS: Well, but your --  
14   your -- the answer you gave to my request depends  
15   entirely on the conclusion that (D) is linked to (A),  
16   (B), and (C). Because otherwise, you don't have the  
17   argument that it's precisely relief with respect to a  
18   discrimination under the Fourteenth Amendment.

19                  MR. FOREMAN: But you do, Your Honor. And  
20   that's the -- that's the discussions we had earlier,  
21   that it's response to gender-based discrimination:  
22   Stereotypes of pregnant women will take leave. And so  
23   we think they would stand alone. But as the discussion  
24   today indicated, we think the appropriate way is to  
25   treat this as a comprehensive whole response to

1 gender-based discrimination, and do as you did in Hibbs,  
2 find that it is a congruent proportional response to  
3 gender-based discrimination.

4 Thank you.

5 CHIEF JUSTICE ROBERTS: Thank you, counsel.

6 The case is submitted.

7 (Whereupon, at 11:22 a.m., the case in the  
8 above-entitled matter was submitted.)

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